FILED
AUG 27 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1710

In the Supreme Court of the United States

CURTIS ELLISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in upholding the police stop of petitioner's automobile on a ground not specifically raised in the district court—that an officer's check of petitioner's license plate number in a computer database revealed that petitioner had an outstanding arrest warrant and thereby provided probable cause for the subsequent stop.

2. Whether the court of appeals erred in rejecting petitioner's racial profiling claim on the ground that there was no evidence that petitioner had been subjected to racial profiling.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 11

TABLE OF AUTHORITIES

Cases:

American Constr. Co. v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372 (1893) 6
Brotherhood of Locomotive Firemen v. *Bangor & Aroostock R.R.*, 389 U.S. 327 (1967) 6
Delaware v. *Prouse*, 440 U.S. 648 (1979) 9, 10
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 6, 7
Harris v. *United States*, 390 U.S. 234 (1968) 4
Huber v. *Taylor*, 469 F.3d 67 (3d Cir. 2006) 8
Katz v. *United States*, 389 U.S. 347 (1967) 4, 9
New York v. *Class*, 475 U.S. 106 (1986) 4
Olabisiomotosho v. *City of Houston*, 185 F.3d 521 (5th Cir. 1999) 5
Ortega-Rodriquez v. *United States*, 507 U.S. 234 (1993) 7
Pinney Dock & Transp. Co. v. *Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir.), cert denied, 488 U.S. 880 (1988) 3, 8
Singleton v. *Wulff*, 428 U.S. 106 (1976) 7

Cases—Continued: Page

United States v. *Diaz-Castaneda*, No. 06-30047, 2007 WL 2044244 (9th Cir. July 18, 2007) 10
United States v. *Echeverria-Escobar*, 270 F.3d 1265 (9th Cir. 2001), cert. denied, 535 U.S. 1069 (2002) 8
United States v. *Matthews*, 615 F.2d 1279 (10th Cir. 1980) 5
United States v. *Twilley*, 222 F.3d 1092 (9th Cir. 2000) 10
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 6

Constitution, statutes and rule:

U.S. Const. Amend. IV 4, 5, 8, 9, 10
Equal Protection Clause 10, 11
18 U.S.C. 922(g) 2
18 U.S.C. 922(g)(1) 2
Sup. Ct. R. 10 7

Miscellaneous:

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 6

In the Supreme Court of the United States

No. 06-1710

CURTIS ELLISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-63) is reported at 462 F.3d 557. The memorandum opinion and order of the district court (Pet. App. 67-76) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2006. A petition for rehearing was denied on January 17, 2007 (Pet. App. 65). The petition for a writ of certiorari was filed on April 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Eastern District of Michigan returned an indictment charging petitioner with possessing firearms after having been convicted of a felony,

in violation of 18 U.S.C. 922(g)(1). Pet. App. 34, 67. Before trial, the district court granted petitioner's motion to suppress the relevant firearms. *Id.* at 67-76. On the government's interlocutory appeal, the court of appeals reversed. *Id.* at 32-63.

1. While on routine patrol, Officer Mark Keeley of the Farmington Hills (Michigan) Police Department pulled into a two-lane service drive adjacent to a shopping center. Officer Keeley testified that a white van, with a male driver inside, was idling in the lane closest to the stores in an area marked with "Fire Lane" and "No Parking" signs. Officer Keeley parked to observe the van and entered the vehicle's license plate number into his patrol car's Law Enforcement Information Network (LEIN) computer. The LEIN search revealed that the vehicle was registered to petitioner and that petitioner had an outstanding felony warrant. Officer Keeley radioed for back-up and continued observing the van. After two minutes, another male got into the van, and the van drove away. Officer Keeley followed the van until his back-up was nearby, then activated his lights and stopped the van. Pet. App. 33.

Officer Keeley advised the driver that he was being stopped for parking in a fire lane and asked for his license, registration, and proof of insurance. The passenger then stated that he was the registered owner of the vehicle. After verifying petitioner's identity, the officer arrested him on the outstanding warrant and conducted a safety pat-down, during which he found two handguns on petitioner, a Smith and Wesson 9mm semi-automatic and a Taurus .40 caliber semi-automatic. Pet. App. 33-34, 67.

2. Petitioner was indicted on a charge of being a felon in possession of firearms, in violation of 18 U.S.C.

922(g). Pet. App. 67. Petitioner moved to suppress the seized firearms as the fruit of an illegal search. After an evidentiary hearing, the district court found that the van was not parked illegally and that the officer therefore lacked probable cause to stop petitioner's vehicle. *Id.* at 73. The court further concluded that the officer's LEIN check was not appropriate, in part because no traffic violation had occurred. *Id.* at 74. Accordingly, the court suppressed the firearms. *Id.* at 75.

3. On interlocutory appeal, the government did not challenge the district court's finding that the van was parked legally. Rather, the government argued that because petitioner had no reasonable expectation of privacy in the information contained on his license plate, no probable cause was required for Officer Keeley to run the LEIN check, and the results of the LEIN check provided probable cause for the subsequent stop of petitioner's vehicle. The court of appeals reversed on that basis. Pet App. 32-63.

a. As a preliminary matter, the court of appeals rejected petitioner's contention that it should not consider the expectation-of-privacy issue because the government had not specifically raised it in the district court. Pet. App. 34-36. The court explained that, although it "generally will not consider an argument not raised in the district court and presented for the first time on appeal," that general rule does not apply in "exceptional cases" or where failing to consider the argument would result in a "plain miscarriage of justice." *Id.* at 36 (quoting *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir.), cert. denied, 488 U.S. 880 (1988)). The court of appeals determined that this case falls within those exceptions because the question is purely legal, the parties fully briefed it, no further fac-

tual development is required, and permitting the district court's erroneous holding to stand would result in a miscarriage of justice. *Ibid.* In doing so, the court of appeals noted that, by holding the LEIN search invalid, the district court had necessarily implied that petitioner had a reasonable expectation of privacy in the information contained on his license plate. *Id.* at 35-36.

Turning to the merits, the court of appeals concluded that an individual does not have a reasonable expectation of privacy in his license plate number. Pet. App. 37-38. The court relied on the settled principles that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection," *id.* at 37 (quoting *Katz* v. *United States*, 389 U.S. 347, 351 (1967)), and "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure," *ibid.* (quoting *Harris* v. *United States*, 390 U.S. 234, 236 (1968)).

The court of appeals further observed that, in *New York* v. *Class*, 475 U.S. 106 (1986), this Court held that an automobile's Vehicle Identification Number, located inside the passenger compartment but visible from outside the car, does not receive Fourth Amendment protection because the "exterior of a car, of course, is thrust into the public eye." Pet. App. 37-38 (quoting *Class*, 475 U.S. at 114). "Logically," the court of appeals explained, "this reasoning extends to a legally-required identifier located outside the vehicle," especially considering that "[t]he very purpose of a license plate number, like that of a Vehicle Identification Number, is to provide identifying information to law enforcement officials and others." *Id.* at 38.

The court of appeals further held that petitioner had no expectation of privacy in an officer's entry of his li-

cense plate number into a law enforcement database because he "had no privacy interest in the information retrieved by" the officer. Pet. App. 38. The court found no support for the contention that "using a license plate number—in which there is no expectation of privacy—to retrieve other non-private information somehow creates a 'search' for purposes of the Fourth Amendment." *Id.* at 38-39. The court further observed that every court that has addressed this issue has agreed that a motorist has no relevant expectation of privacy. *Id.* at 40-41 (citing, *e.g.*, *Olabisiomotosho* v. *City of Houston*, 185 F.3d 521, 529 (5th Cir. 1999); *United States* v. *Matthews*, 615 F.2d 1279, 1285 (10th Cir. 1980)).

In a footnote, the court of appeals observed that petitioner "makes a brief argument on appeal that racial profiling occurred in this case." Pet. App. 42 n.4. The court rejected that contention because "the record is completely devoid of any evidence that the officer ran the LEIN check because the driver was black." *Ibid.*

b. Judge Moore dissented. Pet. App. 42-63. She asserted that the court of appeals should not have addressed the expectation-of-privacy issue because the government had not made that argument in the district court and the record did not address various factual questions that she considered relevant to the Fourth Amendment analysis, such as "what type of information is available on the [LEIN] system" and "how this information is obtained." *Id.* at 44-45. Judge Moore also questioned whether it would be constitutional, in the absence of reasonable suspicion, to run a license plate number through the computerized records maintained in the LEIN system, but concluded that the record was inadequate to permit resolution of that issue. *Id.* at 47-55.

Finally, Judge Moore asserted that petitioner had produced sufficient evidence of racial profiling to warrant a remand to the district court for an evidentiary hearing on the issue. Pet. App. 58-63. She relied primarily on the district court's rejection of the officer's proffered reason for the stop. *Id.* at 60-62.

ARGUMENT

Petitioner argues (Pet. 20-30) that the court of appeals erred in reversing the district court's suppression ruling because: (i) the court of appeals considered a ground not raised in the district court; (ii) petitioner had a relevant expectation of privacy; and (iii) petitioner believes he was subject to racial profiling. The court of appeals' interlocutory decision does not warrant further review.

1. As an initial matter, this Court typically awaits final judgment before exercising certiorari jurisdiction. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari). Lack of finality "alone [is] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916).

In particular, this Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the end of criminal proceedings if a defendant's conviction and sentence ultimately are affirmed on appeal. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). That approach promotes judicial efficiency be-

cause the issues raised in the petition may be rendered moot by further proceedings on remand. If the suppression issue remains live following further proceedings on remand, petitioner could raise that issue, along with any other issues, in a single petition following the entry of final judgment. See *Hamilton-Brown Shoe Co.*, 240 U.S. at 258.

2. a. Petitioner argues (Pet. 20-23) that the court of appeals should not have considered whether he had a reasonable expectation of privacy because the government did not raise that specific argument in the district court. Petitioner does not argue that the court of appeals adopted an incorrect legal standard concerning the consideration of arguments not raised below, or that the courts of appeals are divided on that question. Instead, like Judge Moore's dissent, petitioner argues that the court of appeals misapplied its legal standard to the facts of this case. See Pet. 21-23; Pet. App. 44-47. That fact-bound contention does not warrant further review. See Sup. Ct. R. 10. To the contrary, this Court has explained that there is no need for uniformity among the circuits in their development or application of rules concerning the consideration of issues not raised in a timely manner. *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993); see *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals.").

It is well established that an appellate court may, as a matter of discretion, entertain a legal argument by the appealing party, not advanced below, when the issue is one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue in the

trial court. See, *e.g.*, *Huber* v. *Taylor*, 469 F.3d 67, 74-75 (3d Cir. 2006); *United States* v. *Echeverria-Escobar*, 270 F.3d 1265, 1268 (9th Cir. 2001), cert. denied, 535 U.S. 1069 (2002). In accord with that principle, the Sixth Circuit has determined that it will consider arguments not raised in the district court in "exceptional cases" or where failing to consider the argument would result in a "plain miscarriage of justice." *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir.), cert. denied, 488 U.S. 880 (1988) (citation omitted).

The court of appeals properly exercised its discretion to address the government's argument. The court noted that the expectation-of-privacy issue is a purely legal one that the parties had briefed with sufficient clarity and completeness to ensure a proper resolution. Pet. App. 36. Moreover, the district court had held that, under the Fourth Amendment, officers may run license plate numbers through the LEIN system only in limited circumstances, such as when an officer had already stopped a vehicle, had information that preceded the LEIN check, or had observed a traffic violation. *Id.* at 74. As the court of appeals noted, the expectation-of-privacy issue was logically antecedent to that holding because "the district court could only find that the LEIN search violated the Fourth Amendment if it first concluded that [petitioner] had a 'constitutionally protected reasonable expectation of privacy' in his license plate number." *Id.* at 36.

While Judge Moore argued in dissent that factual details abut the LEIN database were necessary to the disposition of the expectation-of-privacy issue, see Pet. App. 45, the court of appeals correctly explained that those questions "are not relevant to the question of whether the entry of petitioner's license plate into the

LEIN system constituted a 'search' under the Fourth Amendment," *id.* at 36-37. Indeed, as discussed below, "[t]he dissent fails to state how using a license plate number—in which there is no expectation of privacy—to retrieve other non-private information somehow creates a 'search' for the purposes of the Fourth Amendment." *Id.* at 38-39. In any event, the court of appeals' discretionary decision to consider the expectation-of-privacy issue does not warrant further review.

b. On the merits, the court of appeals correctly held that petitioner had no reasonable expectation of privacy in his automobile license plate number, which was displayed in plain view outside his automobile. Pet. App. 37-41. Like the dissent, petitioner does not challenge that holding. See Pet. 28; Pet. App. 48. Nor could he: "What a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

Instead, petitioner asserts (Pet. 28-30) that the officer's entry of his license plate number into the LEIN system constituted a "search" without probable cause. But petitioner provides no basis for that contention, and there is none. As the court of appeals explained, retrieving publicly available information such as an arrest warrant is not, without more, a "search" of petitioner's person, house, papers, or effects. See Pet. App. 38-39.

While petitioner relies (Pet. 28-30) on *Delaware* v. *Prouse*, 440 U.S. 648 (1979), that case held that an officer could not make a non-checkpoint *stop* of a vehicle for the purpose of checking a driver's license in the absence of reasonable suspicion or probable cause. *Id.* at 650. The Fourth Amendment was implicated in *Prouse* "because stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning" of that

Amendment. *Id.* at 653. In contrast to stopping a car and detaining its occupants, however, running a LEIN search does not constitute a seizure. And the results of the LEIN search gave the officer probable cause for the subsequent stop of petitioner's vehicle. See Pet. App. 41.

As the court of appeals noted, its decision is supported by the decisions of all of the other courts to consider the issue. See, *e.g.*, *United States* v. *Diaz-Castaneda*, No. 06-30047, 2007 WL 2044244, at *3 (9th Cir. July 18, 2007) (collecting cases). Petitioner incorrectly suggests that the court of appeals' decision conflicts with decisions that found Fourth Amendment violations where a vehicle stop was based on an officer's mistaken belief that a traffic violation had occurred. Pet. 18 (citing, *e.g.*, *United States* v. *Twilley*, 222 F.3d 1092 (9th Cir. 2002)). There is no conflict, however, because the court of appeals in this case did not uphold the stop based on the officer's belief that a traffic violation had occurred; instead, as discussed, it upheld the search on the alternative ground that the officer knew, from the LEIN search, that there was an outstanding warrant for petitioner's arrest. Pet. App. 41.

3. Finally, petitioner argues (Pet. 10-19, 24-28) that this Court should grant a writ of certiorari to explore broadly the issue of race profiling under the Equal Protection Clause. That issue is not presented in this case. The evidence at the suppression hearing indicated that Officer Keeley entered the license plate number into the LEIN system before he became aware that the driver was black. See Gov't Resp. to Pet. for Reh'g En Banc 7-8. Thus, while the district court rejected the officer's testimony that the van was parked illegally, the court did not find that the LEIN check was racially motivated.

And the court of appeals noted in a footnote that, although petitioner's brief included a short Equal Protection Clause argument, "the record is completely devoid of any evidence that the officer ran the LEIN check because the driver was black." Pet. App. 42 n.14; see *ibid.* (emphasizing the "complete lack of evidence to support a racial profiling argument"). The court of appeals' footnote describing its understanding of the record in this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

WILLIAM C. BROWN
Attorney

AUGUST 2007